CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

EASTERN DISTRICT. JUNE TERM, 1813.

GENERAL RULE.

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IT is ordered by the Court, that no person shall be examined, for the purpose of admission as a counsellor and attorney at law, unless, in addition to all other things required by law, he produce, to this Court, a certificate of his having been, in the office of some practising attorney, at least three years previous to any application made, to be admitted; except such as produce a licence given in any other State, or Territory of the Union, or such as have heretofore been admitted under the late territorial government.

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LE BRETON vs. NOUCHET.

A young couple, domiciliated in New-Orleans, running away to, and marrying at Natchez, will have their conjugal rights, according to the laws of their domicil

LE BRETON vs. *NOUCHET.*

THE plaintiff stated herself to be a widow, and the mother of Alexandrine Le Breton, deceased, and as such, her forced heir, and claiming her estate; that her said daughter, being only thirteen years of age, and having no domicil, but her mother's, fled therefrom, with the defendant, to Natchez, in the Mississippi Territory, where they were married, without the consent, and contrary to the will of the plaintiff—that no marriage settlement took place, and that, after a short stay, in Natchez, they returned to New-Orleans, where the defendant demanded, from the guardian of the said Alexandrine, her part of the estates of her father and grand-father, whereupon the defendant received $ 10,685, 59, on an express stipulation of the defendant, to hold the same, as the dote of the said Alexandrine, binding all his estate for the restoration of the said dote, on the dissolution of the community, or any other case provided by law—that during the community, the defendant acquired certain real property, in the City of New-Orleans and slaves—that the said Alexandrine died intestate, and without issue.

THE prayer was that the defendant be decreed to pay the plaintiff, the sum thus received, with interest since the death of said Alexandrine, together with one half of the property, he acquired during the community.

THE answer admitted the marriage, as stated

in the petition, and stated that, at the time, it was the intention of the defendant, and his wife, to remain in the Mississippi Territory, and not to return to that of Orleans—that the defendant came to New-Orleans, to receive his wife's property, accompanied by her, and was afterwards induced, by unforeseen circumstances, to give up the idea of settling in the Mississippi Territory, as he before intended—it admitted the receipt of the money, mentioned in the petition, and stated that, at the time, he did not know, neither did he discover, till after the death of his wife, that he was absolutely entitled, by law, to receive and retain the money, thus paid him, to his own exclusive use. That, at the time of his wife's death he had no property, but the houses and slaves mentioned in the petition, which were mortgaged, for the security of debts which he had been obliged to contract, during the marriage, for his and his wife's support.

He prayed that, if his claim to the whole of his wife's property was not allowed him, under the laws of the Mississippi Territory, under which the marriage was celebrated, he might be allowed the marital portion, under those of the State of Louisiana.

Evidence was introduced of the defendant's declarations, both before his departure for, and after his arrival, at Natchez, of his intention to settle

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in the Mississippi Territory. One of his brothers swore that, previous, to his leaving New-Orleans, he had told him, and his other brothers, he intended to stay at Natchez. Other persons deposed that letters, expressive of the same determination, had been received by them from Natchez, shortly after their dates.

The judgment of the District Court was that the defendant pay to the plaintiff, the amount of the succession of his wife, reserving to himself, one fourth part thereof as his marital portion.

From this judgment the defendant appealed.

Livingston for the appellant. It is certainly true, as a general principle, that contracts must be interpreted and have their effects, according to the laws and customs of the place, in which they are made; and that the *lex loci*, in this respect, will be respected, in the tribunals of any other country, in which the parties may afterwards remove, or the contract is sought to be enforced. This is a principle of the law of nations, indeed of natural law, which is recognized every where. The contract of marriage never was excepted from the general rule; indeed the rule is universal.

In Spain, by the laws of which this country is still peculiarly governed, this principle is so revered, that it has been thought unsafe to leave it to the authority of general laws, it has therefore

been consecrated by a special law of the country. *La costumbre de aquella tierra, do fizieron el casamiento, deue valer quanto en las dotes, en las arras, e en las ganancias que fizieron; e no la de aquel lugar, do se cambiaron, 4 part. tit.* 11, *l.* 24. The custom of the country, in which the marriage was celebrated, ought to regulate the dower, and other advantages of the parties and not the custom of the country to which they afterwards remove. See the commentary of Gregorio Lopez, on the text cited and *las leyes de Toro*, 626, n. 75.

The Mississippi Territory, it is admitted, is regulated, in this respect, by the common law of England according to which "Those chattels, "which belonged formerly to the wife are by act "of law, vested in the husband, with the same "degree of property, and with the same powers, "as the wife, when sole, had over them." 3 *Comm.* 433.

Lastly, the plaintiff is, at all events, entitled to retain one fourth of his deceased wife's estate, as his *quarte maritale*, or marital portion: she having died rich and leaving him in necessitous circumstance, and there being no children. *Civil Code* 334, *art.* 55.

Moreau for the appellee. The principle, invoked by the counsel of the appellant, that contracts,

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without the exception of that of marriage, must be regulated, interpreted and enforced, not according to the *lex fori*, but according to the *lex loci*, is true: but, it is equally incontestable that it is not applicable to cases, in which the intention of the parties to the contract, was that it should have its execution, in another country, that that in which they then were.

This is particularly applicable to the contract of marriage, and to the case now under the consideration of the Court. *Quando*, says, the commentator on the law of the *partida*, cited for the appellant, *maritus et uxor contrahunt matrimonium in certo loco, non animo ibi commorandi, sed recedendi in domicilium viri, seu uxoris, seu aliquid quod de novo vir constituit; tunc inspicietur consuetudo loci, in quo se transferunt, & non consuetudo loci in quo matrimonium contraxerunt.* Here the parties intended, to transfer themselves, after the mariage *in domicilium uxoris*. It is, therefore, the law of that domicil, not that of the place in which the marriage was celebrated, that is to regulate their future rights.

It happens every day, says *Huberus*, that men in Friezeland, natives and sojourners marry wives in Holland, whom they immediately bring into Friezeland. Now, if at the time of the marriage, they intended, immediately to settle in Friezeland, there will not be, in such a case, a commu-

nity of goods. Altho' they make no special contract, the law of Friezeland, and not that of Holland, shall govern: the latter, not the former, is the place of their contract. See farther *Brown's C. L.* 390. *Traité de la communauté* 16, *n.* 18.

In order, however, that we may avail ourselves of this reasoning, we are to shew that the intention of the parties, at the time of the contract, was to return to New-Orleans, the *domicilium uxoris*. Now a man's acts are better evidence of his intentions, than his words oral or written.

The evidence of the plaintiff's declarations, and that contained in his letters, ought to have been rejected as illegal. Even, if the Court see fit to consider it, they cannot yield their belief to what is thus asserted. It is improbable, that Natchez was the intended place of residence of the parties—no preparation appear to have been made there—nothing is shewn from which the least probable ground can result to suppose it—nothing shews Natchez, an eligible place—they appear to have had no acquaintance there—no property—the only apparent reason we see for their visiting that place, is the facility, it afforded to the consummation of their immediate wishes—as soon as these are gratified, no inducement existing to remain there the parties instantly return to New-Orleans—and there is not the least tittle of evidence from which it may be concluded that they ever thought of the City of Natchez.

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LASTLY, we must recover, for, whatever may have been the rights of the appellant : he must pay us, for, being of full age, and *sui juris*, he bound himself by a notarial act to reimburse.

By the Court. For the decision of this case, it is necessary to enquire :

FIRST, whether, according to the principles of the law of nations, the laws of the place, where a contract has been entered into, are to govern its effects every where ;

AND, secondly, whether the special provision of the Spanish statute, which directs, that the customs of the place, where a marriage has been contracted, shall govern the effects of such marriage, is applicable to the present case.

I. WITH respect to the law of nations, the principle, recognized by most writers, may be reduced to this ; that although no power is bound to give effect, within its own territory, to the laws of a foreign country, yet by the courtesy of nations, and from a consideration of the inconveniences, which would be the result of a contrary conduct, foreign laws are permitted to regulate contracts, made in foreign countries. But, in order that they may have such effect, it must, first, be ascertained that the parties really intended to be governed by those laws, and had not some other country in contemplation, at the time of

the contract. This being previously recognized, the government, within the bounds of which, such foreign laws claim admission, has next to consider, whether the enforcing of these laws will cause no prejudice, to its rights, or to the rights of its citizens.

Let us take the first exception, and apply it to this case. Did the parties really intend to be governed, by the laws of the Mississippi Territory, and had they not in contemplation, at the time of contracting marriage, their return to this country? If we were to judge, from their acts alone, there could be no hesitation, in saying that they went to Natchez, for the only purpose of contracting marriage, and intended to come back, as soon as it could conveniently be done. Their remaining at Natchez, only a few weeks, and that in a tavern, their return to New-Orleans not long after, and the continuation of their residence there, until the death of the wife, would amount to an irresistible proof that they had this country in contemplation, at the time of contracting their marriage. But, it is alleged that, however, evident their intention may appear, from these facts, the appellant had really taken the resolution, to settle at Natchez. Evidence has been furnished of his declarations, to that purpose, both before his departure, and after his arrival in the Mississippi Territory. One of his brothers has sworn, that, previous to his leaving New-Orleans, he told him, and his other

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brothers, that he intended to stay at Natchez. Other persons have deposed that letters, expressive of the determination of the appellant, to remain there, were by them received from him, shortly after their dates. Without questioning the propriety of the admission of such testimony the Court is satisfied, that it is insufficient, to counterbalance the weight of the facts, which disclose the real intention of the parties.

II. BUT, should their intention still remain a subject of doubt, we have next to consider, whether by permitting the laws of the Mississippi Territory to regulate this case, this government would not injure its own rights, or the rights of its citizens. For, a foreign law having no other force, than that which it derives from the consent of the government, within the bounds of which it claims to be admitted, that government must be supposed to retain the faculty of refusing such admission, whenever the foreign law interferes with its own regulations. A party to this marriage was one of those individuals, over whom our laws watch with particular care, and whom they have subjected to certain incapacities, for their own safety; she was a minor. Has she, by fleeing to another country, removed those incapacities? Her mother is a citizen of this State; herself was a girl of thirteen years, who had no other domicil than that of her mother. Did she not remain,

notwithstanding her flight to Natchez, under the authority of this government? Did not the protection of this government follow her, wherever she went? If so, this government cannot, without surrendering its rights, recognize the empire of laws, the effect of which would be, to render that protection inefficacious. But the laws of the Mississippi Territory, as stated by the parties, do not only interfere with our rights, but are at war with our regulations. By our laws, a minor, who marries, cannot give any part of his property, without the authorisation of those, whose consent is necessary, for the validity of the marriage. By the laws of the Mississippi Territory, all the personal estate of the wife (that would embrace, in this case, every thing which she had) is the property of the husband. Again, according to our laws, we cannot give away more, than a certain portion of our property, when we have forced heirs. But what our laws thus forbid, is permitted in the Mississippi Territory. And shall our citizens be deprived of their legitimate rights, by the laws of another government, upon our own soil? Shall the mother of Alexandrine Dussuau lose the inheritance of her deceased child, secured to her by our laws, because her daughter married at Natchez? Shall our own laws be reduced to silence within our own precincts, by the superior force of other laws? If such doctrine were maintainable, it would be unnecessary

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for us to legislate. In vain, would we endeavour to secure the persons and the property of our citizens. Nothing would be more easy, than to render our precautions useless, and our laws a dead letter. But the municipal law of the Mississippi Territory, which is relied upon by the appellant, is not the law, which would govern this case *even there.* The law of nations is law at Natchez as well as at New-Orleans, according to the principles of that law, "personal incapacities, communicated by the laws of any particular place, "accompany the person, wherever he goes. "Thus, he, who is excused the consequences "of contracts, for want of age, in his country, "cannot make binding contracts, in another." Therefore, even if this case were pending, before a tribunal of the Mississippi Territory, it is to be supposed that they would recognize the incapacity, under which Alexandrine Dussuau was labouring, when she contracted marriage, and decide, that such marriage could not have the effect of giving to her husband, what she was forbidden to give. If that be sound doctrine, in any case, how much more so must it be in one of this nature: where the minor, almost a child, has, in all probability, been seduced into an escape from her mother's dwelling, and removed in haste, out of her reach? We cannot, here, hesitate to believe, that the Courts of our neighbouring Territory, far from lending their assistance to this

infraction of our laws, would have enforced them, with becoming severity. For, if, when an appeal is made, to those general principles of natural justice, by which nations have tacitly agreed to govern themselves, in their intercourse with each other, while nations, entirely foreign to one another, feel bound to observe them, how much more sacred must they be, between governments, who though independent of each other, in matters of internal regulation, are associated, for the purposes of common defence, and common advantage, and are members of the same great body politic?

But, it is contended, that, altho' the law of nations should be found adverse to the pretentions of the appellant, yet, there exists, in the statute of this country, a special disposition imperatively declaring, that the custom of the place, where a marriage is contracted, shall regulate the effects of such marriage, wherever the parties may afterwards remove. There it indeed such a provision in the 25th law of the 11th title of the 4th partida; but the Court is of opinion, that it is not applicable to this case. That provision is evidently intended, to have effect only, within the dominions of Spain. Its objects was to settle the difficulties, which could arise in consequence of the diversity of customs, which prevailed in the different provinces of that kingdom. Were it not so,

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it would be at war with the 15th law of the 14th title of the 3d partida, which expressly forbids the Spanish tribunals to recognize any authority in the foreign laws cited before them, except as to controversies arising between foreigners, upon contracts by them made abroad. But, be that as it may, the law relied on is, as are all laws regulating contracts of any kind, intended only for those who can make contracts, and will never be made to bear upon individuals, who, by the law of that same country, are rendered incapable of contracting. Besides, it regulates only what concerns the *dote*, *arras* and *ganancias*, that is to say, the dower of the wife, the gift usually made by the husband to the wife, on account of the marriage, and the property acquired during the matrimony. This law, to be applicable at all, must relate to marriages, contracted in places where such customs prevail. As to a donation, or what amounts to a donation, of the wife's property to the husband, it has nothing to do with this provision.

If it were required to carry the enquiry any farther, it might also be found that this law is intended for cases, in which the marriage is contracted at the domicil of either, or both, of the parties; and the domicil is afterwards removed to some other place. But superabundant reasons having already been adduced for the rejection of

the pretentions of the appellant, the Court will now dismiss that part of the subject.

IT remains to consider whether the appellant is entitled to the marital portion, allowed to him by the judgment of the District Court. No question has been made, as to the validity of this marriage, and it being proved that the appellant, at the time of the death of his wife, had no property, the Court is bound to recognize his right to the marital portion. That right, once accrued, cannot have been invalidated by a subsequent change of situation: any reasoning, upon so plain a principle, is deemed unnecessary.

LET the judgment of the Court of the first District be affirmed with costs.

ROCHELLE & SHIFF vs. *MUSSON.*

THE petition stated that the defendant, and M'Kibben, being partners, gave the note on which the action is instituted, to the plaintiffs: that the partnership between the defendant and M'Kibben, being afterwards dissolved, the defendant remained charged with the liquidation of the debts—that neither party has paid, and both refuse to pay the note, which is payable and unpaid.

Witness testifying against his interest, good.

Witness declaring himself interested, required to say, how.

A part of the Judge's charge, on a point not called for, may be excepted to.

THE answer, after a general denial avers that no legal or valuable consideration was given for

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the note—that it was not signed by the defendant, and if it was by M'Kibben, he was without authority of signing for the firm, or of binding the defendant—that the plaintiffs have no interest in the note.

THE following facts were drawn from the plaintiffs by interrogatories—that they received the note from Dahmer; and never saw it till he gave it to them—that they received it in collection and were to apply the proceeds, in discharge of a debt due them by Kohm—the defendant Shiff saw in Dahmer's hands, when he gave him the note a check of the defendant, which he believes was the consideration of the note—that they have no interest in the note, except the means it affords them of being paid from Kohm.

AT the trial, five bills of exceptions were taken, to the opinion of the District Court.

1. THE defendant offered M'Kibben as a witness to prove the illegality of the consideration for which the note was given. This was opposed on the ground that the witness was one of the firm, whose signature was at the foot of the note. He did not pray to be excused: the Court, however, declared him an inadmissible witness.

2. THE defendant then offered Dahmer, for the same purpose, who at the plaintiffs' request was sworn, on his *voir dire*, and declared he had a

pecuniary interest in the event of the suit, as if it were to be determined against the defendant, he, the witness, would have to pay the amount of the note, or some part of it. The defendant now desired leave to question the witness, on the *nature* of the interest spoken of; this being objected to, the Court determined that the question was improper. Whereupon

3. THE defendant prayed the opinion of the Court, whether the witness was an admissible one, and the Court answered in the negative.

4. HE next offered Goodwin, for the same purpose, who, without any objection being made, was sworn in chief, and on the motion of the plaintiffs, as he was proceeding to give his testimony, on the *voir dire*, notwithstanding the opposition of the defendant. The witness declared it occurred to him he was liable for some counsel's fees, on the event of the defendant being cast.

ON this the Court held, that the witness, altho' sworn in chief, might, without the consent of the defendant, be sworn on the *voir dire*—that, after the answer he had given, he could not be questioned farther by the defendant, as to the nature of his interest—that the witness was inadmissible.

5. THE Judge in his charge told the Jury that "altho' it appeared by the record, that the plain-"tiffs had sworn they had never given any con-"sideration for the note, and that no part of the

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" amount, when recovered, would belong to them, " still they were entitled to recover. "

THERE was a verdict and judgment for the paintiffs, and the defendant appealed.

Depeyster for the appellant. I. The Court below erred in rejecting the testimony of M'Kibben. It is true he was a partner of the late firm, whose signature is to the note; but he has not been made a defendant in the present suit, and if there be now a verdict for the present defendant, the witness will not be able to avail himself of it. He is called in, to testify against his own interest. A witness cannot be rejected as an interested one, unless his be a direct interest. *Bart* vs. *Baker*, *Peake* 144. A party to a note may be examined as a witness. 3 *Mass. T. R.* 225, *Peake* 161. A person interested in the *question* on trial, but not in the event of a suit, is a good witness. 1 *Caines* 260. If a witness he competent to answer *any* question in the cause, he ought not to be rejected *generally*, *Peake* 148, 2 *Root* 132.

II. THE Court below erred, in refusing to allow us to examine Dahmer, so as to draw from him the peculiar nature of his alledged interest. Had we been permitted to avail ourselves of his answer, in this respect, we would have shewn that the interest he spoke of was imaginary and

voluntary. A witness on his *voir dire* may be asked further questions, than merely whether he has an interest or not in the suit. 4 *Mass. T. R.* 653. *Harding* 50. An imaginary interest will not enable a witness to withhold his testimony. 2 *Poth.* 310, *Peake* 163.

III. DAHMER was likewise a good witness. When sworn on his *voir dire*, he declared that whatever interest he had in the suit was in direct opposition to the defendant, by whom he was called. If the defendant obtained a verdict, the witness found himself under the obligation of paying the note, or a part of is amount. *His* name did not appear on the note.

IV. THE defendant was improperly deprived of the testimony of Goodwin. This witness was laid aside, because he declared that he would be liable for some counsel's fees, on the event of the plaintiffs' success. Had we been permitted to proceed farther in his examination, we would have been able to shew that it was, by his own voluntary act, that he lay under the liability of paying these fees, and therefore, that act of his could not divest the defendant of his previous right to the disclosure of the facts in the witness's knowledge.

A witness's liability to pay costs must be proven by other testimony, than his own declarations. 1 *Anton's N. P.* 7.

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A person shall not, by his own act, render himself an incompetent witness, when a party has acquired an interest in his testimony, as by laying a wager, *Peake* 164; 2 *Pothier* 308, *Buller's N. P.* 29.

V. LASTLY, the Court misdirected the Jury: the suit is in the name of Rochelle and Shiff, in their own right and not for the use of another: they swore that they never gave any consideration therefore, and that the note is the property of another person.

Ellery for the appellees. By the common law, the interest, which excludes a witness from the book, must be *direct*, not contingent or remote; it must be in the *event* of the suit, not in the *question* depending: and the Judges have leaned to receive the objection as going to the *credibility* rather than to the *competency* of the witness. But, by the *Civil Code*, 312, *art.* 28, a witness, who is interested *directly* or *indirectly* is incompetent. Keeping this in mind, let us approach the exceptions, which are all attempted to be supported, by principles drawn from the common law.

I. THE Court refused to admit M'Kibben, 1. because he was a partner of the appellant, at the time the promissory note was given, on which the suit is brought, and as such liable to contribute, and he had no release from the appellant.

2. HAD he had a release from the appellant still he could not be sworn, because his liability to the appellees continued. *Peake's evidence, Ed.* 1812, 147. *Peake N. P.* 179, *Root*, 998, *Tomkins* vs. *Beers.*

3. BY the *Civil Code*, 396, *art.* 1, partners are bound in *solido* to their creditors : when bound *in solido* each *totum et totaliter debet*, *Civil Code* 278, *art.* 103, *Pothier* on *obligations.*

4. M'KIBBEN, from the nature of the defence set up, had a *direct* interest. The action is brought upon a note of hand and the plea that it was given for an *illegal* consideration, to discharge a gaming debt and, therefore, void. If, therefore, judgment be given for the appellant, the note is invalidated and can never be recovered in a suit against M'Kibben, whose interest it is on that account to invalidate it.

5. No person can be called upon to invalidate a note by him signed. 2 *Johnson* 165, *Coleman* vs. *Wise.* Parole evidence is not admissible to explain or annul an act. *Civil Code* 310, *art.* 242.

II. DAHMER was rejected : but he was not an admissible witness, 1. because on his *voir dire* he declared he had an interest. It is true this interest was in favour of the party, objecting to his admission ; but this circumstance does not alter the law, for the Civil Code makes no dis-

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tinction in regard to the *kind* of interest, which disqualifies a witness.

2. BECAUSE his testimony, if given, would have exposed him to a future inconveniency, and might have subjected him to a civil action or charged him with a debt, therefore, he was not compelled to testify. *Store* vs. *Whetmore*, *Kirby*, 203. *Star* vs. *Tary*, 2 *Root*, 528, *Peake's ev.* 167, 187. The Court, therefore, was right in protecting him from an examination, from a principle of justice, and in not exposing him to the temptation of committing perjury.

3. HE made no objection, it is said, to his being examined: neither was it necessary: for it was the duty of the Court to protect him, and the objection made by the counsel of the appellees superceded the necessity.

4. BECAUSE his answer might have subjected him to a criminal prosecution: he was called to prove the illegality of the consideration of the note, viz. that he, the witness, had taken it in payment of a gaming debt. If to this he answered in the negative, his testimony was of no use to the party producing him; if in the affirmative, he criminated himself.

5. BECAUSE his testimony, as a single witness, ought not to have been taken against the answers on oath of the appellees, to the interrogatories exhibited by the appellant in his answer. These, according to our statute, cannot be disproved,

except by the oaths of *two* credible witnesses, or that of one credible witness and strong corroborative circumstances. 1805 *ch.* 26, *sect.* 9. Now M'Kibben and Goodwin (as will be presently seen) being incompetent witnesses, left Dahmer as a *sole* witness, to impeach the oath of the appellees and there certainly was no corroborating circumstauce.

III. It is objected that the appellant was not suffered to cross-examine Dahmer, upon the *voir dire*. 1. For the party to cross-examine a witness, when the adverse party puts him on the *voir dire*, is without precedent or necessity. At common law, the party requiring the witness to be examined on the *voir dire* is suffered to draw from him the nature of his interest; because, by that law, there is an interest which goes to the *credit* as well as the *competency*: but here that reason does not exist, as all interest in a witness goes directly to his *competency*.

2. A witness on the *voir dire* is the witness, strictly speaking, of neither party—but of the Court. He is not as yet sworn in the cause, but only *veritatem dicere*, well and truly to answer all such questions as shall be put to him by the Court.

3. By stating on which side his interest lay, the witness answered every pertinent question.

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that could be put to him, on a cross-examination upon the *voir dire*.

4. The Court below ought to direct and control the examination and cross-examination of witnesses and this power ought not to be taken out of its hands.

IV. It is objected as to Goodwin, that after having been sworn in chief, he was put on his *voir dire*—that he was not examined thereon—he was improperly rejected.

The incompetency of a witness may be shewn *by proof*, prior to examination, by *voir dire* and by cross-examination, 4 *Burr.* 2256. Objections to the incompetency of a witness never come too late, *Swift's ev.* 109—111. 1 *Esp. Rep.* 37. *T. R.* 719, *Peake's ev.* 186, 1 *M'Nally* 146. swearing on the *voir dire* is only an act of supererogation.

2. The second branch of the exception as to Goodwin, has been answered in regard to Dahmer.

3. The witness was properly rejected, as he acknowledged his direct interest, against the appellees, in the event of the suit.

V. Complaint is made that the Court below misdirected the Jury, in charging them to find for the appellees, tho' they had no beneficial interest in the suit. To this we answer, 1. that a bill of exception does not lie to the charge of an

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Inferior Court: the remedy being, by a motion for a new trial. *Peake's ev.* 589, 2 *Caines, Graham vs. Cameron* 163. Here, there was no application to the Judge to charge the Jury on any particular point.

2. A legal title is sufficient to enable the appellees to recover, without any beneficial interest. The appellant gave the appellees this title by making the note in their favour.

Depeyster, in reply. It is true, that no parole evidence can be received, to explain or annul an act. This is a rule both of the common and civil law. Yet, in every country, the consideration of a note, between maker and payee, may be inquired into: because this is a circumstance *dehors* the act—so is coverture, infancy: those are every day given in evidence, and the consequence is that the note is thereby annulled.

It cannot be denied that the Civil Code does not distinguish as to the *kind* of interest which disqualifies a witness—but reason tells us that, that interest, which rather *prevents* than *induces* perjury, cannot be a legal impediment: for *cessante ratione, cessat & ipsa lex.*

When the answer of the party to the suit is sought to be contradicted, two witnesses or one with corroborating circumstances are necessary—but this will not authorise the rejection of a witness—for the party seeking to disprove needs

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not introduce all his testimony at once: he may begin with one witness—if this stands alone, his testimony will be rejected, unless the party offering him shew, in some part of the evidence before the court or jury, some corroborating circumstance.

It is the practice of all Courts, after a witness has sworn, on his *voir dire*, that he has an interest, to prosecute the inquiry, as to the nature of that interest, the manner in, and period at, which it arose—and when he swears that he is without any interest, he is as often examined on circumstances tending to shew his error or prevarication.

By the Court. This cause comes up on exceptions to certain opinions, given by the Judge of the District Court in the First District, on the trial below.

I. The first exception is to the rejection of David M'Kibben, a witness offered by the defendant, in the suit before the District Court, to prove the illegality of the consideration of the note, on which the plaintiffs found their action. The suit is brought against Musson, as acting partner of the late firm of M'Kibben & Musson, on a negotiable paper, purporting to be a note of hand signed by M'Kibben & Musson. It has been determined by the Supreme Court of the State of New-York, in the case of *Coleman* vs.

Wise & al: 2 *Johns.* 165, that a person whose name appears to a negotiable note, is not a competent witness to impeach the validity of the note: the same thing has been decided by the Court of King's Bench in England, in the case of *Shalton* vs. *Shilly* 1 *Term. R.* 296, and on the same principle, considering the signature of any person to a negotiable paper, as an affirmation that, to his knowledge, there is no legal objection to the recovery.

It is admitted that the Courts of England, in the administration of justice, under the municipal laws of that government, have by their late decisions, restrained as much as possible the rules of evidence relative to the competency of witnesses; and now suffer circumstances, which may be presumed to create an improper bias on their minds, rather to affect their credibility than their competency. Perhaps, the common law, at this time, recognizes only one description of interest, which shall exclude a person from testifying, and that is a direct interest, to be immediately benefited or injured by the event of the suit. We think that, in this case, M'Kibben has a direct interest in its determination, which is to annul or establish the validity of a note subscribed by himself and on his own proper account; and, the most favourable construction of the rule, for the admissibility of testimony, must render him incompetent: he is interested in favour of the

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party by whom he is called to testify and the rule laid down in the Civil Code 112, *art.* 258, will exclude him whether his interest be direct or indirect. He is offered as a witness to give evidence relative to a partnership transaction, being one of the partners—in 3 *partida*, *tit.* 6, *law* 21, it is declared that one partner cannot be a witness for or against his copartner, in any thing appertaining to the partnership: the District Judge was therefore right, in repelling him.

II. and III. THE second exception is taken to the opinion of the District Judge rejecting George Dahmer, a witness offered by the defendant below for the same purpose for which M'Kibben was called—Dahmer it appears from the facts stated in the record was at the request of the plaintiff's counsel sworn on his *voir dire;* and a third exception is taken to the judge's opinion in not allowing him to be examined on said oath, so far as to ascertain in whose favour he is interested. In support of this opinion, it is contended by the counsel for the appellees, that our Civil Code having declared the rule, relative to the competency of witnesses, to extend to the exclusion of all persons interested, directly or indirectly in the cause, it is therefore, immaterial whether called on to testify, for or against their interest, they ought not to be admitted, and it is said the good policy of the regulation is evident

being to prevent the crime of perjury. That the legislature never intended this rule to affect the right of suitors, to require the testimony of persons against their own interest, is apparent from the privilege given by the act of the legislative council of the late territorial government and recognized by the Civil Code, reciprocally to examine on interrogatories, and obtain the answers of the parties themselves to any suit. If this regulation of the Civil Code does alter the general rule of the common law, so that the most indirect interest must destroy the competency of a witness, it may nevertheless be reconciled with the rule found in *Peake's* treatise on evidence that a person interested in a cause is an objectional witness, only when he comes to prove a fact consistent with his interest; for, if the testimony he is to give be contrary to his interest, he is then the best possible witness, that can be called, and no objections can be made to him. The competency of witnesses depends as much on the manner in which they are interested, as the interest itself, that is whether they are called on to support or destroy their interest, and therefore when a person is offered as a witness, and sworn on his *voir dire*, the examination ought to be suffered to ascertain, in favour of which party he is interested. But it appears from Dahmer's answer, that his interest (if any he has) is in favour of the plaintiffs below, having stated that if the suit

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was determined, in favour of the defendant, he would have to pay the amount or part of the amount of the note. He is clearly a competent witness, and the District Judge has erred in rejecting him. How far a witness may be bound to answer questions or testify to facts which may subject him to a criminal prosecution, or civil suit, is unnecessary to determine: these circumstances relate to the *manner of interrogating* him and not to his competency.

IV. A fourth exception is taken to the opinion of the Judge of the District Court: 1st. in allowing John Goodwin, a witness offered on the part of the defendant to be sworn on his *voir dire*, after having been sworn in chief: 2d, that when thus sworn, at the request of the plaintiffs, he refused to examine him sufficiently to ascertain in whose favour he was interested, and 3dly, that he rejected him as incompetent.

THERE are two principal modes of discovering the interest of a witness, 1st, proving it by other witnesses: 2dly, obtaining a knowledge of it from the witness himself and in this latter mode it is very immaterial whether it is done on an oath administered in chief, or on his *voir dire*: consequently no error has been committed by the Judge in suffering the oath of *voir dire* to be taken, after having been sworn in chief.

But if the Court be correct in its reasoning, as to the necessity of shewing, in which of the parties' favour the witness may be interested, the Judge erred in not allowing Goodwin to be examined, so as to ascertain that fact: and as upon this circumstance depends his competency or incompetency, it is impossible to determine, whether he ought or ought not to have been admitted, for it does not appear sufficiently clear in whose favour he is interested; or at what period he became interested and by whose act.

V. The 5th and last exception is to the opinion of the Judge, in directing the jury that Rochelle and Shiff, the plaintiffs, in the District Court, were entitled to recover, altho' they had admitted by their answer to the interrogatories put by the defendant, that they have given no consideration for the note and that the money, if recovered on it, would not belong to them, but that they would be bound to pay it over to a third person. In opposition to this exception, it is insisted by the counsel for the appellees, that exceptions will not lie to the charge of a Judge of an Inferior Court and that the only remedy left to the party dissatisfied is a motion for a new trial. Perhaps in England the proper remedy is a motion for a new trial, for there the correctness of the Judge's instructions to the Jury, at *nisi prius*, comes fairly before the Court in that way; but, in this State,

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if the question cannot come up on a bill of exceptions, the party would be without any other remedy, than the bare possibility of convincing the Judge below, that he had so far mistaken the law, as to give redress by a new trial. The act of the legislature authorises the parties to a suit, to require the opinion of the Judge of the Inferior Court, and if dissatisfied to except to such opinion; we can see no good reason why an erroneous opinion voluntarily given by a Judge should be placed on a footing different from one required: and it is settled in the Supreme Court of the United States that exceptions may be taken to a charge given by the Judge to a Jury even in cases, when the opinion of the Court has not been asked for by the party. The defendant below had, therefore, a right to except to the Judge's charge to the jury; but this Court is of opinion that there is no error, in the instructions which were given. The appellees have clearly a legal right to recover the money, arising from the act of the appellant, in making his note payable to them, and unless the consideration, on which it was given, can be shewn to be illegal and void, he must be bound to pay the money, agreeably to its tenor and effect; without regard to any equitable claim, existing between them and third persons. We are, therefor, unanimously, of opinion that the judgment of the District Court must be reversed and the cause be remanded, there to be again tried, with

instructions to the Judge to admit Dahmer to be sworn in chief as a witness; and to examine John Goodwin, on his *voir dire*, so as to ascertain in which of the parties' favour he is interested, what kind of interest he has, how and when he became interested.

SYNDICS OF SEGUR vs. *BROWN.*

A sale of property, by a person, who has ceded his goods, is not void, but voidable.

By the Court. This case comes before us on an appeal from a final judgment and order of the District Court of the first District, rendered in two several suits commenced, and orders of seizure obtained by the appellants, in the late Superior Court of the late Territory of Orleans. The important facts in the cause, relate to two plantations, possessed by Segur, previous to his failure and surrender of his property for the benefit of his creditors; one containing sixteen arpens front, purchased by him from Marigny and the other containing three arpens and one half front, purchased from Laronde and subject to a mortgage of 5,100 dollars. Segur, after the surrender of his property, it appears, sold the small tract to La Roche, by a private instrument; which sale his creditors did not consent to or oppose; afterwards, he sold, with the agreement and consent of the syndics of his creditors, the tract acquired from Marigny, to John B. Prevost, holding a

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mortgage on it for the price. Prevost also purchased from La Roche the smaller tract; at the same time, hypothecating it to secure the payment of the purchase money, and still subject to Lalonde's mortgage. This being the situation of the property, on the 21st of March 1807, Brown, the appellee, purchased from Prevost both tracts, subject to the incumbrances, stated in the act of sale, for the sum of 50,700 dollars, to which sale the syndics of Segur's creditors made themselves a party, accepting the agreement of Brown to pay them 18,000 dollars; 9,000 of which were paid by him, previous to his absconding from this country, which, together with other payments made, left a balance, in favour of the syndics of 7721 dollars, independent of interest, as appears by the statement of the referees, appointed by the late Superior Court; and after going through a long calculation of interest, at the rate of 6 per cent. they make the total amount due to the syndics 11,382 dollars.

I. The first question, raised for the determination of the Court, relates to the right of the appellants to claim interest. There are three species of interest, known to our laws: bank interest at 6 per cent., conventional, and legal; the former cannot exceed 10 per cent. and the latter is fixed at 5, and is by law recoverable, in all cases of money due, from the date of the judicial de-

mand: it is also recoverable when no demand has been made, in cases where the debt is owing for things which, from their nature, may be supposed to produce revenue or fruits; and it is expressly laid down in Domat, on the Civil law, in *book* 3, *tit.* 5, *sect.* 1 *art.* 4, that the purchaser of a farm owes interest, on the price which has not been paid, agreeably to the terms of sale, altho' no demand has been made, and even should he receive less revenue from the land, than the interest of the price.

The Judge of the District Court, we think, was right in rejecting the calculation of interest at 6 per cent., being founded on a private agreement, between Prevost and the appellants, to which Brown was no party; but there can be no doubt that interest ought to be calculated, at the rate of 5 per cent., on the balance due by Brown to them, which together with the principal ought to be paid, out of the proceeds of the sale of the plantation.

II. The second, and most important question to be decided in this suit, is, whether the appellants are properly subrogated to the rights of Laronde, in the mortgage of 5,000 dollars on the small tract of 3 and 1-2 arpents front.

It is contended, on the part of the appellee, 1. that the private sale, made by Segur to La Roche, is null and void, having been made after the

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cession of his property; because he had no authority to sell, that being vested in the syndics of his creditors alone.

2. THAT the syndics, representing the rights of the creditors, and making themselves a party to the sale, from Prevost to Brown, in which both tracts of land are included, are bound to quiet the purchaser, in his possession of the plantation thus sold, for the sum stipulated in that sale, and consequently to free him from all previous incumbrances.

IT may be properly admitted that Segur, after the surrender of his property, to the use of his creditors, could not make a valid sale, or transfer of any part of it, without their consent. We are inclined to think that a sale, thus made, is not absolutely void, *ab initio*; but only such as may be avoided, and set aside, by the persons whose rights and interest may be injured by it; for by the Civil Code the surrender does not give the property to the creditors; it only gives them the right of selling it for their benefit, and receiving the income till sold.

BROWN's claim to this portion of the land, purchased from Prevost, and the right of all claiming under him, are founded on the sale from Segur to La Roche; and, therefore, they cannot, on any principle, be allowed to consider it as void. The only persons, who had a right to have it an-

nulled, are the creditors of Segur, which so far from attempting, they have thought proper to remain silent on the subject, and, perhaps, would not now be permitted to make any objection, on account of their long acquiescence, and having been parties to acts transfering the property, under the authority of that sale, which must, therefore, be considered as good and valid. La Roche sold to Prevost the land, subject to Laronde's mortgage, and, to secure the payment to himself of the price, agreed on between them had it hypothecated for the sum of 7,000 dollars, of which $ 1900 had been paid, by Prevost; leaving the balance due, 5,100 dollars the amount of Laronde's mortgage. Since the sale to Brown, La Roche has paid to Laronde 2,500 dollars, on account of said mortgage, and was, by operation of law, subrogated for that amount to the rights of the mortgagee, being the purchaser of an immoveable property, and having employed the price of his purchase in paying a creditor, to whom the hereditament was mortgaged; and has since transfered his right, thus acquired, to the appellants, who have also paid, for the benefit of the creditors generally, the balance due on said mortgage, and, by convention with Laronde, have been subrogated to his rights; so that, they are entitled to the whole amount, secured by that mortgage. Those rights have been acquired, since the sale to Brown by Prevost; consequently,

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no act of the appellants, in becoming a party to that instrument of sale and transfer, can invalidate them.

The arguments of counsel, which would go to limit the syndics to the receipt of the sum alone, which the purchaser, Brown, agreed to pay must fail, because they could not, by any act of theirs, affect the rights and interests of third persons and such, were La Roche and Laronde, to whose rights they have since been subrogated, and are entitled to recover the amount of 5,000 dollars due on said mortgage with interest, as calculated by the referees; in their award returned to the late Superior Court; which together with the sum due on the mortgage of the tract sold by Segur, by the consent of his creditors, the Judge of the Court below ought to have ordered the Sheriff to pay to the appellants instead of the sum of 9,000 dollars. The judgment and order of the District Court must, therefore, be reversed; and we do order and decree that the Sheriff pay over to the appellants the sum of $ 17,688 17, with the costs of this appeal: and that the mortgage be cancelled and annulled.

PIZEROT & AL. vs. *MEUILLON'S HEIRS.*

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PIZEROT & AL. vs. MEUILLON'S HEIRS.

The time of prescription in a suit for a partition is thirty years.

Solemnities, required in testaments, are matters of strict law.

Commandants might receive acts, whatever the value of the property.

MEUILLON married the plaintiffs' sister, in 1787 : five years after she died, without issue, leaving her husband. Her will contains a bequest of about twenty four hundred dollars, *to be paid from her share in the succession of her mother* ; another to her husband of "the enjoyment of "her part in the succession of her mother, *during "his life*, and at his death to her heirs ;" by another clause she "leaves to her husband, the "absolute disposition of the goods acquired in "community, viz. to give them to those of the "relations of the testatrix, as he shall believe to "have merited them, or to dispose of them, at "his will, otherwise, without being holden to "render any account."

TEN months after her death, Meuillon executed an act before a notary, wherein he declared that "of his own free will and mere motion, he "renounced purely and simply, and in the best "form of law, all legacies, donations, dispositions "and all other advantages, generally whatever, "stipulated in his favour, by and in the last will "and testament of Madame Meuillon Pizerot, "his wife, which *legacies, donations, dispositions, "rights and other advantages generally whatever, for the friendship he has for the brothers and sisters of his deceased wife, he abandons to them, purely and simply.* To which

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"end, he obliges himself to return to them the "two thousand dollars, which he has received "from her mother, as a part of her paternal "estate. This renunciation is declared to be made on condition, that the brothers shall pay the legacies; which they agreed to do. "Whereupon, "the said Meuillon declares the said testament "generally, in what ever regards him to be void "and of no effect, and that it is to be considered, "as far as it regards him, as if it had never been "made."

A short time after, he paid to the brothers the two thousand dollars, for which they gave him a notarial discharge.

MADAME Meuillon brought nothing into the marriage, at the time it was contracted, and nothing during its existence, but the two thousand dollars of her father's estate. Meuillon was rich: several negroes and other property were acquired during the marriage. At the death of Madame Meuillon, no inventory was made, nor any account stated or payment made of the matrimonial gains, or profits made during the marriage—to obtain these was the object of the present suit.

MEUILLON, before his marriage, owned a plantation and a number of slaves, which he had contracted to sell to Mather, who had been put in possession, and had sold about twenty of the slaves and made some payments: but afterwards,

finding it inconvenient to make the purchase, he surrendered the plantation and the negroes unsold. There was found among Meuillon's papers, after his death, a loose receipt, by which he acknowledged to have received a certain quantity of indigo, as the last payment of the plantation: but Mather admitted that the payments he had made were a trifling indemnification for the slaves he had sold and the use of the others and of the plantation.

East. District. June 1819.

Pintard & al. vs. Meuillon's heirs.

During the marriage, Meuillon had acquired a number of negroes, which he had sold, on a credit to several of his relations, taking their notes therefore: and, at a period which could not be ascertained, he made an endorsement on said notes, declaring his intention that the debtors should be discharged, if he did not collect the amount of the notes, during his life.

He had at the time of his marriage, a debt due to him by Mather and Strodder of $ 8,500, and he received in payment of it twenty six negroes, a number of whom he sold.

During the marriage, he purchased, among other property, several negroes and houses and lots, in New-Orleans, and after the death of his wife, he made large improvements on these and other lots, which he then purchased, and added to one of the latter a strip of ground eleven feet wide, from one of those purchased during the marriage.

East. District. June 1813.

Fitzhot & al. vs. Meuillon's heirs.

The plaintiffs insisted 1. that all the estate, left by Meuillon, was to be considered as *acquest* or matrimonial gain and profit, unless the defendants shewed the contrary.

2. That Meuillon, having made no inventory, the community of goods was to be presumed to have continued till the time of his death.

3. Otherwise, they were entitled to one half of the acquets during the marriage, and the profits thereof since that time.

4. That the defendants were bound to account, for one half of the revenue of the plantation, disposed of to Mather, during the marriage; as well as one half of the amount of the notes of Meuillon's relations. The plaintiffs also claimed one half of the improvements, on the lots in New-Orleans, made since the death of Mad. Meuillon.

The defendants 1. admitted the first proposition, but contended it must refer to the period of Mad. Meuillon's death.

2. That the community was then dissolved.

3. That no account was due, because there were no gains—because the will gave them to Meuillon, and *the instrument cited could not operate as a renunciation.*

The decision of the Court of the first district being, in favour of the defendants, on the last

breach of the third proposition of the defendants, the plaintiffs appealed therefrom.

In the course of the argument, the plea of prescription was opposed to the plaintiffs' claim of a division.

Livingston for the plaintiffs. I. No prescription will run, when there has been no division. *Pothier de la Comm. Part.* 3, *ch.* 11, *art.* 3, *n°.* 698. The prescription is 30 years. *Ahora* 389.

II. The partnership is renewed when the partner, or the heirs suffer the business to be continued as before. 3 *Febrero.* 181 *ch.* 9, *s.* 1, *n.* 12.

A partnership is tacitly contracted in many cases. But whether a new partnership shall be presumed to have been contracted, or the old one continued or renewed, when, the husband or wife being dead, the survivor retains possession of the common property, is affirmatively answered by *Matienzo, Velasco, Escobar* and others. Yet it is most true that the partnership does not take place, *with the father*, who is presumed to have kept the property, as the lawful administrator, and having the usufruct of all the maternal and adventitious estate of the son, is not obliged to participate the gains. *Ant. Gomez, Var. Rep.* 594 *n.* 2.

If after a dissolution of the marriage by the wife's death, the husband retains the common

East. District. June 1813.

Pierrot & al. vs. Meuillon's heirs.

estate, and make profit thereby, and a division be demanded by the emancipated children, one half of the profit made since the death of the wife shall be given them: the reason is that the husband during widowhood is supposed to remain in the same marriage. *Matienzo* treats this question at large. *Gloss. n°. 1, as. 9, and following.* In *n°. 13*, he says, the contrary opinion *seems* to have been supported by some: but in n°. 17 to 26, he decides the question by distinguishing different cases: and in almost every one he concludes that the community continues and that one half of the gains are given to the heirs of the wife. 2 *Azevedo*, 290, *l. 5, tit. 9, l. 2, n°. 18.*

The heirs of the wife, whether lawful or instituted, *legitimos o extranos* shall be entitled to one half of the fruit, of the *gananciales, until the division*, if any of them were productive. 4 *Febrero*, 295, *l. 1, c. 4, s. 4, n°. 86, 87, & 88.*

If the marriage be dissolved by the death of one of the parties, and the survivor retain the common property the subsequent gains are to be divided with the heirs of the deceased. 5 *Part. tit. 10, l. 10, in notis.* By the custom of Orleans, if no inventory is made, the community continues even with collateral heirs. *Pothier* 848 773. *Part. 6, ch. 1, sect. 1, art. 3, n°. 773.* A continuation of the community, not according to the Roman laws, prevails in different countries, as

Spain, &c. 2 *Voet*, 157. The husband or wife marrying again, without making partition with their first children, must communicate to them subsequent profits. *Siguenza de C.* 402, 110.

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Thus it is clear the partnership was continued by the mere act of the law.

III. It was farther continued by the act of Meuillon. He forbore making an inventory as it was his duty, if he had wished the dissolution of the community.

The surviving husband or wife, administering the effects of the community, ought to make an inventory. *Ayora de partitionibus*, 10, *n°*. 9. *Ant. Gomez, Var. Resp.* 594 : *Martinez, Azevedo, Escobar.*

Every thing, which Meuillon's heirs do not prove to have been his, before marriage, must be considered as profit and be divided. The income of the estate shall be common, tho' it belong to husband and wife, in different proportions : but the inheritance itself shall be given to the one to whom it belongs. *Nueva Recop.* 732, *l.* 4. Every thing shall be presumed matrimonial gain and be divided, unless the contrary appears. 1. *Febrero de contratos* 203, *ch.* 1, *s.* 22, *n°*. 241. *Nueva Recop. l.* 5, *tit.* 9, *l.* 1, *Ant. Gomez, in leg. Tauri.*

The children and heirs of the wife may proceed

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in rem for the one half of the *gananciales*, which the father may have sold, since the death of the wife: but only when his goods are not sufficient to pay the value. *Siguenza* 415, 149.

CROP growing, at the time of the decease, is to be divided: so the increase of cattle. *Gomez in leg. Tauri*, 623, 71.

THE children of a female slave, brought in as a marriage portion belong to the wife, if she was not valued. 4 *Partida, tit.* 11, *l.* 21.

THE increase of cattle are fruits, and belong to the usufructuary; but it is said, not so of slaves: for *it would be absurd, that man, for whose use nature has provided all fruits, should be considered as fruit himself.* *Inst.* 1, *s.* 37 *& ff.* 22, *s.* 28. If there be, however, no other reason for the distinction, than this punning conceit, the conclusion is questionable: see *ff* 22, 1, 14 § 1, where a different doctrine is laid down. Devise in trust to restore the inheritance, *sine reditu*: held that the children, born after the devise, shall not pass. See, also *Ord. Roy. tit. de las gananciales.*

LASTLY, the plaintiffs are not barred from any right of theirs by the will, because

1. MEUILLON has renounced, every advantage therein made to him, in their favour.

2. INDEED, nothing was therein given him for

his own advantage, he was only made a trustee by the will; every thing given to him in it is a *fidei commissum*, which he was in justice and in honor bound to restore to the plaintiffs. They, not he, were the objects of the liberality of the testatrix. He understood the will so, and in discharge of the trust reposed on him, he executed the deed of renunciation.

3. If it were otherwise, the will would not stand in the way of the plaintiffs. They would take the estate as *hæredes nati*. It does not appear to have been dictated in the presence of the witnesses: nor subscribed by the witnesses in that of the testatrix. Those formalities are required by law: and in the confection or execution of a will, whatever is required is matter of strict law, not to be dispensed with: and the non-performance of it imports the nullity of the instrument. This is a question of fact which it is not too late to examine. 1 *Febrero*, 173, 189, *Code Civil. Pandectes Françaises.*

Mazureau, for the defendants. 1. By the death of Mad. Meuillon, the community was dissolved *ipso facto*. Such is the general principle *ff. de socio, l.* 59.

The partnership is dissolved by the death of one of the partners: so that, in the beginning of it, we cannot stipulate that the heirs will succeed to it. 6 *Rodriguez* 811. 5 *part. tit.* 10 *l.* 1.

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THIS principle is equally applicable to the conjugal partnership as to all other partnerships. The conjugal partnership, being a consequence of marriage, the marriage ceasing, must cease with it. It cannot extend farther; for being contracted for a determinate period (the duration of the marriage) it must end at the expiration of that period. 1 *Febrero de juicios, tit.* 1, *ch.* 4, *s.* 4, *n°.* 89.

II. THE will has put an end to all the effects of the community: nothing is left to the plaintiffs, in the community. Hence there was nothing to liquidate, no inventory to make.

HE alone, who has an account to give, is bound to make an inventory. 1. *Febrero de Juicios ch.* 1, *s.* 2, *tit.* 1, *n°.* 42. Meuillon having no child, even if he had an account to render, would not have been bound to make a formal inventory. *Febrero, loco citato n.* 100. *verbo pero por omitir, &c.* The want of an inventory does not, therefore, cause the community to continue.

IF there was no common property, in the hands of Meuillon—if every thing belonged to him under the will, or if he was thereby left free of disposing of every thing, without rendering any account, the will may well be said to have left nothing common, between him and the collateral heirs of his wife.

BUT the will is said to be void, all the witnesses

not having subscribed it, in presence of the testatrix. The contrary appears on the face of the instrument: it purports that it was subscribed by the testatrix and the witnesses, after having been read. *Febrero* holds that this suffices.

III. By his renunciation, Meuillon has contracted no other obligation, but that which is formally expressed. The renunciation could have no other effect, than that which it has had during his life. Supposing that the parties had the intention to renew the community and had expressly renewed it, the stipulation would have been iniquitous and void.

The renunciation took place ten months and four days after the death of the wife. Thus, at that time, the will and death of the wife had put an end to the community, it could not, therefore be *continued*; the continuation of a community being its uninterrupted duration. *Repert. de jurisp.*

No new one was intended to be contracted. Meuillon in this act, says he renounces all the advantages he has under the will. This manifests no intention of contracting a partnership. Did he and the plaintiffs contract any?

It is the intention of the parties that ought to direct us rather than the words they have used—*Code Civil* 271, *art.* 56. *Domat* 17, *s.* 2, *art.* 10—18 *art.* 13.

If the parties had intended to renew the com-

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munity, or to contract another partnership, would they not have mentioned it? Would the act have been silent? Had the plaintiffs imagined that there existed a partnership between Meuillon and them, would they have suffered twenty years to elapse, without acting as partners? We find that as long as Meuillon lived, they never interfere, never ask even an account.

On the contrary, on the 6th of January 1793, Meuillon publicly sells all his property: the plaintiffs are present, bid and purchase, as all other persons, without speaking of any right or pretention of theirs. Since the death of Meuillon, they have been present at the sale of his property, and again made a purchase of part of it, as other bidders, without disclosing any claim of theirs.

What better proof can we have of their intention, at the time of the renunciation? It is this intention which we are seeking for. In every convention, the intention of the parties is rather to be attended to than their words. *ff. de verbor. sign. l.* 219. 18 *Rodriguez*, 366.

How can we presume that Meuillon intended to renew the community, or contract a partnership with the plaintiffs? The property was all his own: the plaintiffs were without any thing. We are told he was only a trustee; the property holden by a *fidei-commissum*.

The disposition, in the will, has none of the characters of a *fidei-commissum* or trust. The

trustee may be compelled to dispose of the trust, according to the intention of the person who created it: Meuillon was authorised by the will to dispose of every thing, as he saw best, without being holden to render any account. Even if his intention had been to renew the partnership or contract a new one, I contend the convention would not have been a lawful one.

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Let us attend to the following very important truths.

1. The community had expired without leaving any gain or profit.

2. Under the will, Meuillon was at full liberty to dispose of the gains or profits, if there had been any, without being holden to render any account of them.

3. Even, without the will, Meuillon was master of every thing, since those pretended gains were not sufficient to cover his legal claim.

4. The heirs of his wife, in whose favour he was renouncing, far from bringing any thing into the partnership, received from him two thousand dollars.

5. Before, then, and since that period, Meuillon always managed the property alone.

Now in order to constitute a lawful partnership, it is requisite that every partner should furnish a part of the stock in cash, goods or industry. *Domat, b.* 1, *s.* 1, *art.* 1, *p.* 73, 3 *Febrero de escrituras* 165 *ch.* 9, *n.* 1, 166 *n.* 2.

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MEUILLON furnished all the stock, all the industry, ran all risks.

LET us then conclude, that if Meuillon had really consented to the partnership, his agreement would have been illegal and void—binding neither in law, nor in equity—or rather let us conclude he never intended to contract a partnership with the plaintiffs.

IF the behaviour of the parties—the absence of a stipulation—their silence for twenty years—the situation of the old community, do not disprove the intention of contracting a partnership, these circumstances render the pretentions of the plaintiffs in this respect, at least *doubtful*. A doubt suffices for us. In *dubiis semper quod minimum est sequimur, ff. de oblig. & act. l.* 47, 16 *Rodriguez*, 113. *Domat*, 18 *art.* 15, *Code Civil* 271, *n.* 62, *ff. de verb. obl. l.* 38 § 18; 16 *Rodriguez* 148.

THIS principle is so extensive, that when every thing tending to restrain the obligation is not expressed, it is presumed to have been omitted. *ff. de verb. obl. l.* 99, 16 *Rodriguez* 193. *Quia stipulatori liberum fuit, verba late concipere.*

I conclude that by the renunciation Meuillon contracted no other obligation than that of paying the two thousand dollars mentioned therein.

IV. HAD Mad. Meuillon died intestate, the society not dissolved by her death, and had Meuil-

lon remained in possession of all the property, after her death, still there would be no continuation of the community.

THE law *del Fuero*, invoked by the plaintiffs and the only one which may be said to have any bearing on the present case, relates only to lawful *children* or issue; the plaintiffs are *brothers*, collateral heirs.

V. THE will is to decide this cause. It gives Meuillon power to dispose of the property, in favour of the heir of the testatrix, whom he may deem the most worthy, or in any other manner, without being held to give any account.

THIS disposition is either a legacy, in favour of Meuillon, or an authority to act as he pleases.

1. IF it be a legacy—he became by the death of the testatrix the absolute owner; because being in possession, he needed no delivery.

2. IF it be an authority: by accepting it, he has contracted the obligation of disposing of the property, to some person, besides himself.

THE plaintiffs contend that the acquets belong to them. Has Meuillon disposed of them in their favour? If he has, in what capacity has he done so; as owner under the legacy, or in execution of the authority given him? In either case, they are bound to produce an express title.

IF the disposition was made as legatee, a donation was necessary—where is it? In the remun-

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ciation? None of the sacramental expressions are found there. It was requisite that he should formally declare that he *gave*: for he had both the title and the possession—because he was owner; and a donation is never presumed. If the clause of renunciation is pretended to be equipollent to a donation, it ought to be (*insinuated*) recorded, before the *Juez Mayor* and on failure, it is void. *Part.* 5, *tit.* 4, *l.* 9.

If the disposition was made in execution of the authority given him, it ought to have been expressly stated he was acting under that authority, and not that he was renouncing an advantage—for the charge of executing a power is no advantage to the person, entrusted with it. Where is the proof then that he disposed of the property, in that manner? Not surely in the renunciation. If on the next day the plaintiffs had talked to him about the acquets, he would have answered "I have renounced, in your favour, all the advantages I had under the will of your sister—these do not include the *acquets*, which I am authorised to dispose of in the manner I shall think proper. This disposition has been made and you have nothing to do there with."

The renunciation relates to the portion of Mad. Meuillon of the succession of her mother: this is evident from the precaution which has been taken to stipulate that all the legacies should be paid by the plaintiffs.

By the Court. * This is a case of great importance, both as to the amount of property in dispute, and the legal principles involved in its decision.

I. The first question, that presents itself for the decision of the Court, is, whether the claim of the appellants is barred by a prescription of ten years.

Several authorities have been cited and, at first view, it would appear that some of them (particularly *Febrero*) support the doctrine contended for by the appellees; but, upon a close examination of the subject, it will be found, that thirty, not ten years, is the period of prescription in an action for the division of gains, or the partition of an estate.

It is, indeed, said by *Febrero* that among persons of full age, after a lapse of ten years, a division of the inheritance shall be presumed; but it is clear, from his subsequent observations, that the claimants, upon whom the burthen of proof is thrown, are permitted to shew that no division was made. In this case, so far from its being pretended, that this has been done, the right of the appellants to partition, at any time, is denied. The Court are of opinion that even, could

* Derbigny, J. did not join in this opinion, having been of counsel in the cause.

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the argument of prescription be attended to, at this stage of the cause, it would not avail the appellees.

II. The will of Mad. Meuillon is the next subject, for the consideration of the Court. It is said by the appellants, that it does not appear, from the notary's certificate of the execution of the will, that it was dictated by the testatrix, in the presence of the witnesses. It has been very correctly observed, that all the solemnities required, in the execution of testaments, are matters of strict law, and ought to be observed. But the objection, to the validity of the will, comes with an ill grace indeed from the heirs of Mad. Meuillon, who twenty years ago, recognized its legality, in the most solemn manner, before the proper authority, and accepted from the husband of their sister a renunciation of considerable advantages, held under it. If there had existed any doubt, upon this subject, at that period, there can be no question that efforts would have been made to destroy it, by a regular suit, instituted for that purpose, and that would have been the proper time; but the Court are of opinion that, after the solemn act of the very parties appellant, and the long period that has elapsed (in the course of which some of the witnesses have died) it would be an act of great injustice to permit the validity of the will to be shaken. But, independently

of this serious objection, if we attend to the certificate of the notary, we shall find that all the essential requisites were complied with: he certifies that the testatrix declared, and dictated the will to him, and that it was made and signed by the testatrix, and the witnesses, after it was read; from which, it may fairly be inferred, that the four witnesses and the notary were all present during the dictation and execution.

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III. On the part of the appellees, it is contended that the renunciation of Mr. Meuillon was not executed, with all the solemnities, required by the then existing laws; and is consequently void. This instrument appears to have been made before Jacques Massicot, captain of militia, Commandant and Judge of the parish of St. Charles. It is said, that by the laws of the partidas, it is declared that all acts respecting property, above the value of 1500 maravedis d'oro, shall be executed before, and with the knowledge of the *Juez Mayor*, or superior Judge of the place; and this is construed to mean, before the Auditor or principal Judge of the colony.

We can never believe that it was the intention of the monarchs of Spain, to require all that strictness in the execution of acts in their distant colonies, which was required in their populous European villages and towns, or that the inhabitants of their most remote Districts in this, or any

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other of their colonies, should be compelled to execute instruments for the conveyance of property above the value of a certain amount, before the Auditor, or principal Judge of the Province. Even in Spain, they might be made in the presence of a Corregidor, Alcalde-Major or other principal officer. This country was laid out in Commandanteies, or Districts, and all acts within the District, were executed before the Commandant or Judge, and deposited with him. To require a strict compliance with a law, made seven or eight hundred years ago, before America was known, intended for a different region of the world, and a different state of things, and which would shake the titles of half the people of the country, would in our opinion be iniquitous and absurd. We believe the practice of the country to have been, as stated above. The Court are of opinion that the Judge of the District was sufficiently authorised, to receive the declaration of Meuillon, and that, consequently, the renunciation was executed with the necessary solemnities.

IV. The next point, for the decision of the Court, is the true construction of this act of renunciation. It was passed on the 10th of November 1792. By the statement of facts it appears that Madame Meuillon, on the 31st. of December 1791, made her will and by the ninth clause, she gives the enjoyment of her part, coming from

the succession of her mother, to her husband, during his life, and at his death to her heirs. Meuillon had received in account 2,000 dollars, and more was in expectancy. By the 10th clause, Mad. Meuillon declares her intention, to leave to her husband the absolute disposition of the goods acquired in the community, that is to say, to "*give them to such of her relations, as he shall believe worthy, or to dispose of them, in any manner, without being held to an account.*" By this testament, Meuillon had a life estate, a usufruct of the succession of his wife, and the absolute disposition of the community of gains. He remained in possession, and did no act, for a considerable time, by which he evinced an intention to give, to the heirs of his wife, any part of the community. On the 10th of November, 1792, Meuillon by a written act declares, that of his own will he renounces all legacies, dispositions and all other advantages generally whatever, stipulated in his favour in the will of his wife: of which legacies, donations, dispositions and rights and all other advantages generally whatever, for the friendship, he bears her brothers and sisters he makes an abandonment, purely and simply: to which effect he agrees to pay back the 2000 dollars, he had received, under the express condition of their paying the legacies charged on the succession. The heirs accept the renunciation and promise to stand in the place of Meuillon. It

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is contended by the appellees, that the renunciation relates solely to the property, which was to come from the inheritance of the wife, and not to any part of the property, acquired during the marriage: of this opinion was the Judge below, and from that Judgment is this appeal.

It must be confessed that the conduct of the parties goes far to impress a belief that such was their understanding at the time—the long silence of the heirs of Mad. Meuillon, and the several purchases they made at the sale of Mr. Meuillon's estate are certainly strong circumstances to shew *their* opinion of the renunciation—this, however, is not conclusive. The Court must decide the rights of the litigants, by the instrument they have executed and the law arising from it. Courts will no doubt give such a construction to a deed, as will fulfil the intention of the parties, when that intention is evidently seen. General declarations will sometimes be restrained by subsequent particular limitations and dispositions; and attention must always be given to the principal object of the contract or agreement. So, in this instance, if, from any part of the instrument, it could be clearly ascertained that the object of the parties was merely the inheritance of Mad. Meuillon, we would restrain the general words of the renunciation, and confine it to that particular estate. But, is there any thing in the deed, restrictive of the general words? Mr. Meuillon

renounces all legacies, dispositions, donations, advantages and rights, stipulated in his favour by his wife's will. Was not the absolute disposition of the community, a stipulation, disposition, right or advantage under the will? If so, it is as clearly renounced, as is his claim to the usufruct or life-estate in the succession of his wife. The Court are of opinion, that the wife's share, in the community of acquets, was renounced to the heirs of Mad. Meuillon.

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But, it is contended that the community continued for the benefit of the appellants to the death of Mr. Meuillon: and to this point, many authorities have been cited. Admitting some of the cases to have weight, there are circumstances, in this transaction, which take it completely out of the principles relied on. A community can only be said to continue, when a copartnership existed, and when no act has been done, evincing a determination to dissolve it, or when no circumstance occur amounting to a dissolution.

But, in this case, there never did exist a community, between Mr. Meuillon and the heirs of his wife. He succeeded to the rights of his wife, and enjoyed them for a considerable time—he was bound to no account, and therefore made no inventory; and if, by an act of liberality, he afterwards gave to the heirs of Mde. Meuillon what *he* was entitled to, under the will (that is

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her share of the acquets *at the time of her death*, it shall not be construed to work a penalty, and injury on himself, or be presumed that he meant to contract a partnership, with those who had never been associated with him, who had never lived with him, to whom he had already sufficiently exhibited marks of kindness, and who surely have no right now to claim from his heirs a moiety of the income of an estate, acquired by his exertions; in which the appellants had no participation.

THIS doctrine of the continuation of the community is founded in the *fuero real* of the kingdom of Spain. We think it would be easy to shew, from the authority of *Febrero*, *Azevedo* and others, that it is necessary to prove the *fuero real* to be in use and force, in the place, where the continuation of the community is contended for. *Febrero, de particiones, b.* 1, *chap.* 4, declares, "the continuation of the conjugal community exists in four cases: one of which is where by custom it has prevailed in a particular place; but it must have prevailed, without interruption, or by unquestionable use of the laws of *fuero*; and this usage must be proved by other partitions, or divisions, which have been made in those places; but if the usage of those laws be not conclusively proved, they have no effect, because, the laws of *fuero* ought to be respected, only when they are observed and used: as is ordained by the first law

of Toro. The laws of Toro (which were made and published in 1505, about 300 years after those of the *fuero real*) having expressly ordained, that they, who attempt to avail themselves of the laws, shall prove that they are in force, in the place where the continuation of the community is claimed. Nothing of that sort being offered here, no instance being shewn of the partition of an estate according to such principles, altho' thousands have been partitioned, the Court, upon this ground alone, would be authorised to reject it—but were they in force, we are of opinion they would have no application to the present case.

In order to establish what was the share, to which Mad. Meuillon's heirs were entitled, it will be necessary to refer to some of the leading principles which prevail, on the subject of the community of gains. At the time of the dissolution of the marriage, all the effects, which the husband and wife possess are presumed common gains, unless they shew which of the effects, they brought in marriage, or have been given them separately, or they have respectively inherited. After having deducted the amount which the husband and wife have proved they brought into marriage or afterwards, and the debts which have been contracted during the marriage, the rest is considered the property of the partnership.

It would have been sufficient for this Court,

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to have reversed the judgment of the District Court, on the ground of the erroneous construction of the renunciation, and to have sent the case down with instructions to ascertain the amount of the community, at the death of Mad. Meuillon; but, anxious to cause justice to be done, in the shortest possible delay, we have been induced to express the opinion of the Court, on several points that have been mentioned in the course of the argument.

1. WITH respect to the plantation and negroes, possessed by Mr. Meuillon, before his marriage, and which afterwards went to Mather, it is the opinion of the Court, that the community cannot be credited for any part of the supposed profits, during the five years of marriage—this property had been acquired before, and Mr. Meuillon, by the laws of the country, had a right to make what disposition of it he pleased. We do not think, the production of a loose receipt (and that too found in the possession of Mr. Meuillon) by which he acknowledged to have received a certain quantity of indigo, as the last payment of the plantation, unaccompanied by other explanatory evidence, sufficient to overturn the solemn allegation of Meuillon himself in a Court of justice, and the answer of Mather confessing all the facts charged, as appears recorded in the proceedings of the late Superior Court.

It is there also acknowledged by Mather, that the small advances made, were but a trifling indemnification, for the slaves that he (Mather) had sold, and for the enjoyment of the rest for twenty two or twenty three years.

2. With respect to the notes given by the relations of Meuillon, for certain slaves sold to them, and which were acquired during the marriage, the Court are of opinion, that they ought to be considered, as part of the acquets or gains. It appears that Meuillon, at a period which cannot be ascertained, made an indorsement on the notes, declaring that, if they should not be paid during his life, the debtors should be discharged—there is no doubt that Meuillon might have made any disposition of the notes he pleased, during the marriage, provided it was not in fraud of his wife. At the death of the wife, the right of her heirs or legatees accrued, and these notes, being unpaid, at the dissolution of the community, by the death of the wife, and Meuillon having renounced all advantages under the will, the appellants are entitled to a moiety of the amount of the notes. Had he made this disposition of the notes, and the wife had survived, still she would have had her moiety of the amount; because, at the very instant of his death, her right would have been complete.

3. The Court is further of opinion that the

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amount of sales of the negroes, bought from Mather and Strother, should be brought into the community and that the amount, due by James Mather and Mather and Strother, be deducted from the total gains.

4. As to the lots and houses in New-Orleans, we are of opinion that the lots purchased, during the marriage, and all such items, as may be within the principles of this decision, be brought into the community, and accounted for in the partition of the estate, and that there be deducted therefrom the value of the buildings and improvements, made by Meuillon, subsequently to the dissolution of the marriage, and also the value of the lot of eleven feet adjoining those, purchased after the death of the wife.

It is ordered and decreed that the judgment of the District Court be reversed with costs.